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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 545

STATE OF INDIANA, ON RELATION OF JOHN L. MAVITY,
Appellant,

vs.

ROBERT H. TYNDALL, WILLIAM H. REMY, PAUL ROBERTSON, SMILEY N. CHAMBERS, CLIFFORD F. BEEKER, JESSE P. McMURTRY,
Appellees

STATEMENT IN SUPPORT OF JURISDICTION

The appellant, in support of the jurisdiction of the Supreme Court of the United States to review, on Appeal, the judgment and decision of the Supreme Court of the State of Indiana (highest court of the State) rendered in the above entitled cause, respectfully represents:

1

Statutory Provisions Sustaining Jurisdiction

The statutory provisions which sustain the jurisdiction of the Supreme Court of the United States to review on appeal said judgment and decision are Section 344 (a) and Section 861 (a) of Title 28 of the United States Code.

2

Statute of State the Validity of Which Is Involved

The statute of the State of Indiana, the validity of which has been sustained by final judgment and decision of the Supreme Court of the State of Indiana, the highest court of the State, as not being violative of or repugnant to the Constitution of the United States and the Fourteenth Amendment thereof or the laws of the United States is Chapter 344 of the Acts of 1945 of the Indiana General Assembly, page 1622 *et seq.* more particularly the pertinent provisions and sections thereof, being Sections 12, 13, 14, 18, 20 and 21, reading as follows:

> "An act concerning a state police department, creating The State Police Department, providing for officers and members thereof, defining their powers and duties, transferring rights, appropriations, supplies, equipment, papers, and property of the existing State Police Department to The State Police Department created by this Act, repealing all laws in conflict herewith and declaring an emergency."
>
> (H. 361. Approved March 9, 1945.)
>
> "Section 12. It shall be the duty of the bureau of criminal identification and investigation to install and maintain complete systems for identification of criminals, including the fingerprint system and the *modus operandi* system. The bureau shall obtain from whatever source procurable, and shall file and preserve for record, such plates, photographs, outline pictures, fingerprints, measurements, descriptions, *modus operandi* statements and such other information about, concerning or relating to any and all persons who have been or who shall hereafter be convicted of a felony or who shall attempt to commit a felony within this state, or who are well known and habitual criminals, or who have been convicted of any of the following felonies or misdemeanors: Illegally carrying, concealing or possessing a pistol or any other dangerous weapon;

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buying or receiving stolen property; unlawful entry of a building; escaping or aiding an escape from prison; making or possessing a fraudulent or forged check or draft; petit larceny; and unlawfully possessing or distributing habit-forming narcotic drugs. The bureau may also obtain like information concerning persons who have been convicted of violating any of the military, naval or criminal laws of the United States, or who have been convicted of the commission of a crime in any other state, country, district or province which, if committed within this state, would be a felony. The bureau shall make a complete and systematic record and index of all information obtained for the purpose of providing a convenient and expeditious method of consultation and comparison."

"Section 13. The bureau shall assist the respective county sheriffs of the state in the establishment of a system for making identifications of criminals in each county, and shall give the respective sheriffs such assistance and instruction in the operation and use of such system as may be requested or as may be deemed necessary. The bureau may likewise give such instruction, advice and assistance to chiefs of police and other peace officers as may be deemed wise for the purpose of securing the establishment and operation of local identification systems. It shall be the duty of the respective county sheriffs, chiefs of police and other peace officers to co-operate with the bureau in establishing and maintaining an efficient and co-ordinating system of identification."

"Section 14. The bureau of criminal identification and investigation shall co-operate with similar bureaus or agencies of the other states, and with the national bureau in the department of justice in Washington, District of Columbia, for the purpose of developing and carrying on a complete interstate, national and international system of criminal identification and investigation."

"Section 18. Every sheriff, chief of police, marshal, constable and every other law enforcement officer in

this state shall make and furnish to the bureau, immediately upon request, fingerprints, photographs, comprehensive descriptions and such other data as to identification as the bureau may require of all persons who are arrested and who, in the judgment of the director of the bureau, are persons wanted for serious crime. This section shall not be construed to include violators of city, town or other local ordinances, or persons who are arrested for the commitment or alleged commitment of a misdemeanor unless the officer making the arrest or the director of the bureau has reason to believe that such violators are implicated in the commission of a felony."

"Section 20. The members of the department shall have the authority and duty to take fingerprints, and such other identification data as shall be prescribed by the superintendent of all persons taken into custody for offenses other than those arising solely out of violations of fish, game, conservation, traffic laws, or misdemeanors but such members of the department shall have the authority, if they deem it advisable, to take the fingerprints and such other identification data as shall be prescribed by the superintendent of all persons taken into custody for offenses arising out of violations of fish, game, conservation, traffic laws or misdemeanors and it shall be their duty promptly to transmit and file such fingerprints and other identification data as the superintendent may prescribe."

"Section 21. The employees of the department shall cooperate and exchange information with any other department or authority of the state or with other police forces, both within this state and outside it, and with federal police forces, toward the end of achieving greater success in preventing and detecting crimes and apprehending criminals."

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3

Date of Judgment and Decision; Date Rehearing Was Denied; Date Application for Appeal Presented

The Supreme Court of the State of Indiana gave the judgment and decision, now sought to be reviewed, on October 10, 1947 (Appendix 17) and denied appellant's timely petition for rehearing on November 12, 1947 (R., p. 44), and appellant presented his application for appeal to the Supreme Court of the United States on December 26th, 1947 (R., p. 45).

4

Parties to the Action

The title of the Action, by inadvertence, failed to designate appellant as an individual and appellees in their official capacities as Mayor, Members of the Board of Safety, Chief of Detectives and Chief of Police, respectively, of the City of Indianapolis, Indiana. However, summonses were issued and served on appellees in their official capacities (R., pp. 3-4); complaint of appellant so designated and complained of appellees (R., pp. 10-12); demurrer to appellant's complaint was filed by Corporation Counsel and City Attorney of said City (R., pp. 31-33); upon first appeal of this cause, the Supreme Court of the State of Indiana in the case entitled *State ex rel. Mavity* v. *Tyndall, et al.*, 224 Ind. 364, 66 N. E. (2d) 755 (Appendix 21), considered appellees as defendants in their official capacities and appellant, John L. Mavity, individually, the real party in interest as party plaintiff (Appendix). On the second appeal of this same case, the action here involved, the parties are still considered as above (Appendix 17). The theory, as set out above, as to parties is continued by the Supreme Court of the State of Indiana in the only other comparable case. *Voelker* v. *Tyndall, et al.* (R., Appendix 34-38).

Stage in Proceedings and Manner in Which the Federal Question Was Raised and How Decided

Appellant originally filed his complaint in the lower court (R., p. 2) to which appellees filed their demurrer (R., p. 6), which was sustained (R., p. 6) and appellant refusing to plead over appealed to the Supreme Court of the State of Indiana (R., p. 7), which court reversed the ruling of the lower court (Appendix 34).

Appellant then filed his second amended complaint and directly raised the Federal question by specifically alleging that by authority of and pursuant to instructions of the laws of the State of Indiana, more particularly the statute contained in the Acts of 1945, Chapter 344, pg. 1622 *et seq.* Appellees took and retained the fingerprint impressions, signatures and photographic likenesses of appellant against his will and desire, and that said legislation permitting said acts is unconstitutional in that

> "it is in violation of the Fourteenth Amendment to the Constitution of the United States * * *, and permits the defendants and all of them to deprive the said plaintiff, John L. Mavity, of life, liberty, property and the pursuit of happiness without due process of law" (R., p. 28).

Appellees filed their demurrer (R., p. 31) which was sustained by the lower court (R., p. 34). Appellant, again refusing to plead over, took his second appeal to the Supreme Court of the State of Indiana (R., pp. 38-39) assigning as error the lower court's sustaining of appellees' demurrer (R., p. 1), which demurrer only alleged that appellant's complaint "does not state facts sufficient to constitute a cause of action" (R., p. 31).

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The Supreme Court of the State of Indiana, in its decision on this second appeal, held, with reference to the statute complained of

> "There is nothing in this statute conflicting with 'due process' or 'equal protection of the laws' as provided for by the Fourteenth Amendment" (Appendix 18).

and

> "We find nothing in the Act complained of that places an unreasonable restraint upon the right of the individual as guaranteed by the Federal and state Constitutions" (Appendix 20).

Nature of the Case

Appellant John L. Mavity, age forty-six (46), a wage earner for more than twenty (20) years with one concern, Veteran of both World Wars, a citizen of the State of Indiana and of the United States, was arrested on misdemeanor charges by officers of the Indianapolis Police Department (R., p. 14), and pursuant to the provisions of the statute complained of, officers of said police department, under control of appellees, took three sets of appellant's fingerprint impressions and signatures together with three sets of his photographic likeness, first requiring appellant to submit to said officers having a card bearing a criminal identification number across his chest, which number appeared on and was a part of said photographs (R., pp. 15-16), said data being compiled on three like cards known and labelled as criminal identification or criminal fingerprint cards, one of which was immediately sent to the Indiana State Police Headquarters, one to the Federal Bureau of Investigation, Washington, D. C. and one retained by said police department (R., pp. 17-18).

Thereafter, investigation was made by all three agencies concerning any previous criminal record of appellant and no such record was found.

Appellant was subsequently tried by a court of competent jurisdiction on said misdemeanor charges and found not guilty (R., p. 20). Whereupon, well knowing that the provisions of said statute authorized the continued publication, dissemination, and exhibition of said criminal identification cards with his photograph thereon to the public and numerous other civilian agencies, as well as to law enforcement officials throughout the world (R., pp. 22-26). Appellant demanded the return or destruction of all of said three fingerprint cards (R., pp. 20-21), and being refused, brought his suit against appellees, alleging that their retention of same violated "due process" and "equal protection of the law" and his Right of Privacy, as an innocent person, guaranteed him by the Constitution of the United States and the Fourteenth Amendment thereof (R., pp. 27-28). To this claim appellees asserted, and the Supreme Court of the State of Indiana, on appeal, affirmed that said acts of the officers of the Indianapolis Police Department were done under appellees' direction and authority as authorized and mandatorily directed by the statute of the State of Indiana herein complained of (Appendix 17).

Ruling of Court and How Same Invoked Jurisdiction of Supreme Court of the United States

The Supreme Court of the State of Indiana in its decision complained of (Appendix) squarely held the statute complained of was not repugnant to nor violative of the Four-

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teenth Amendment of the Constitution of the United States, saying:

> "There is nothing in this statute conflicting with 'due Process' or 'equal protection of the laws' as provided for by the Fourteenth Amendment" (Appendix 18).

and

> "We find nothing in the Act complained of that places an unreasonable restraint upon the right of the individual as guaranteed by the Federal and State Constitutions" (Appendix 20).

It is urged that said ruling and decision of the Supreme Court of the State of Indiana is erroneous and invokes the Federal Jurisdiction for the following reasons:

> (a) That although said Supreme Court of the State of Indiana held "Granting that the citizen has a property right in his fingerprints and picture • • •" (Appendix 19).

it held the statute complained of as not being repugnant to nor violative of the Fourteenth Amendment in that said statute was a reasonable exercise of the police power by the Indiana General Assembly.

Appellant contends that said statute is unreasonable in that it requires the police department, operating under authority of appellees, to permanently retain, without notice and hearing, the personal property of appellant, an innocent man with no previous criminal record, after acquittal such permanent retention and confiscation has not, and cannot have, any reasonable relation to the objectives of said legislation which admittedly creates a department known and designated as "The Bureau of Criminal Identification and Investigation (Sec. 12, *supra*, Para. 2, quoting statute) and creates a system for the identification of

criminals, requiring the assistance of sheriffs of each county, all chiefs of police and other officers in the state (Sec. 13, *supra*, Para, 3, quoting statute), and announces the purpose of said legislation as being

> "toward the end of achieving greater success in preventing and detecting crimes and apprehending criminals" (Sec. 21, *supra*, Para. 2, quoting statute).

(b) That said legislation grants an individual police officer the power and authority, solely within his discretion, to fingerprint, photograph and compile a criminal identification card, to be published and distributed and permanently retained (Sec. 20, *supra*, Para. 2, headed "Statute of State the Validity of Which is Involved"), as heretofore set out, of any person, merely arrested on a misdemeanor charge, but grants said officer the absolute discretion to so do or not to so do, thereby denying the "equal protection of the laws" to all persons in the same class or situation.

(c) That although the Supreme Court of the State of Indiana held

> "that he (appellant) has a right to privacy and protection as guaranteed him by the Constitutional provisions quoted" (Appendix 19).

it further held that said statute did not unreasonably conflict with said guaranteed rights of the Appellant (Appendix).

Appellant contends said statute is unreasonable in denying his guaranteed Right to Privacy by permitting distribution, exhibition and publication of his photograph with police number visible in the form of a criminal identification card, against his will and desire, he being at all times an innocent man and never having had a criminal record, all to his great humiliation and against his peace of mind and happiness, and contrary to any just relation to the protection of the public health, welfare, morals or safety.

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(d) While the Supreme Court of the State of Indiana broadly admits the dignity and rights of a citizen, it seeks to justify the legislation complained of as reasonable and just, and a proper exercise of the police powers by the legislature of the state over its citizens, whereas appellant contends that even such legislative power of the majority does not have unlimited dominion over the inherent, fundamental and natural rights of the individual and that there are such rights, as involved here, beyond the control of the state.

Appellant objects to being forever numbered, classed, catalogued and labelled as a criminal and to having his said photograph grouped and exhibited among the criminal element of society.

8

Substantiality of Federal Question Involved

It is contended that the Federal questions presented herein are substantial, and that the judgment and decision of the Supreme Court of the State of Indiana concerning same are erroneous for the following reasons:

This is a novel and new Federal question. The Federal question of whether State legislation which permits and mandatorily directs the permanent retention, distribution, publication and exhibition of a criminal identification card, so labelled, and bearing not only the fingerprint impressions and signatures, but also the photographic likeness, with a police number visible, of a person found innocent of any crime, after trial, and having no previous criminal record, has never been presented to this Supreme Court of the United States for decision as to whether same is repugnant to or violative of the provisions of the Constitution of the United States or the Fourteenth Amendment thereof.

The Circuit Court of Appeals, Second Circuit, in language, admittedly dictum, in speaking of the permanent

retention of such criminal identification data, upon acquittal, said:

> "It shall be added that all United States Attorneys and Marshalls are instructed by the Attorney General not to make public photographs, Bertillon measurements or fingerprints prior to trial, except when a prisoner becomes a fugitive from justice, and are required to destroy or to surrender to the defendant all such records after acquittal or when the prisoner is finally discharged without conviction. There is therefore as careful provision as may be made to prevent the misuse of the records * * *." *United States* v. *Kelly* (C. C. A. 2), 55 F. (2d) 67.

It is the settled law that the taking of property with exceptions not here applicable, requires "due process." It is contended that the legislation complained of, in requiring the mandatory taking and permanent retention, of what the Supreme Court of the State of Indiana has admitted to be the personal property of appellant, under guise for reasonable exercise of the police power, in fact denies appellant "due process of law" in that said legislation is not a reasonable exercise of the police power in relation to the objectives to be attained. The reasonableness of such legislation, is reviewable by this Court. *Meyer* v. *Nebraska*, 262 U. S. 390.

The decision of the Supreme Court of the State of Indiana in upholding the validity of the questioned legislation entirely disregards the important distinction between the *taking* and the permanent *retention* of said criminal identification data and cards.

Appellant readily admits that the taking of said data, upon arrest, is a reasonable exercise of the police power, for investigative purposes, safekeeping until trial, and apprehension of fugitives. *United States* v. *Kelly, supra,*

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State ex rel. Bruns v. Clausmier, et al., 154 Ind. 599, Indiana Law Journal, Vol. 11, p. 41. However, the permanent retention of said data of an innocent acquitted person with no previous criminal record cannot reasonably serve to promote the lawful objectives of said legislation. The legislation ignores the distinction between guilt and innocence. *Tyson & Bro.* v. *Banton*, 273 U. S. 418. It unreasonably denies innocent persons the Right of Privacy. *McGovern* v. *Van Riper*, 137 N. J. Eq. 24. It inflicts irreparable damage to the individual. *State ex rel. Reed* v. *Harris*, 348 Mo. 426. The upholding of said legislation by the Supreme Court of the State of Indiana therefore, presents a substantial Federal Question, not heretofore decided by this Court.

The Supreme Court of the State of Indiana erred in upholding said legislation which in substance and in part recognizes and creates three classes of citizens, which for want of better phraseology might be called (a) the innocent, (b) the suspected, and (c) the guilty, or (x) the innocent, (y) the accused, and (z) the criminal, and in following the case of *Fernicola* v. *Keenan*, 136 N. J. Eq. 9 (Appendix), which announced

> "It is for police officers and not the Court, to decide whose identification papers will be apt to assist officers in performance of their duties."

and which further said

> "In every large community are men who have never been convicted of an indictable offense but whose associations and manner of life are such that the police feel reasonably assured that such a one, unless he turn over a new leaf, will eventually be guilty of a serious crime."

Appellant urges the true rule concerning the administration of justice in criminal matters to be that announced in

McNabb v. *United States*, 318 U. S. 332, where this Court said:

> "Zeal in tracking down crime is not in itself an insurance of a soberness of judgment * * *. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic."

Said statute upheld by the Supreme Court of the State of Indiana, among other things, left the discretion of taking or not taking said fingerprints and criminal identification data of a person arrested for a misdemeanor within the absolute judgment of the arresting officer (Sec. 20, *supra*, Para. 2, quoting statute, headed, "Statute of State the Validity of Which is Involved"), and having taken same said section mandatorily requires the permanent retention of same, thereby unreasonably denying equal protection of the laws to all persons in like or similar circumstances, contrary to the Constitution of the United States and the Fourteenth Amendment thereof. The discretionary classification is not based on proper and justifiable distinctions, considering the purpose of the statute, and therefore presents a substantial Federal question for review by this Court; furthermore, it fails to meet the requirement that it affect alike all persons in the same class and under similar conditions. It does, and permits to be done, arbitrarily, what this Court has condemned,

> "The lawful instruments of the criminal law cannot be entrusted to a single functionary." (*McNabb* v. *United States, supra.*)

It is finally urged that the upholding of said statute presents the substantial Federal question of whether or not the General Assembly of the State of Indiana may exercise such unlimited dominion of power over the citizens of the State of Indiana as justifies the enactment of said statute

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which so vitally restricts the rights, affects the lives, liberties and property of the citizens, and curtails the security so essential to their happiness and welfare. The legislation disregards that fundamental principle that some rights of the individual in every free government are beyond the control of the State. *Citizens Savings & Loan Ass'n* v. *City of Topeka*, 87 U. S. 655.

Cases Sustaining the Jurisdiction

The following cases sustain the jurisdiction of the Supreme Court of the United States.

1. Timeliness of Appeal:

Aspen Mining & Smelting Co. v. *Billings*, 150 U. S. 31;
Citizens Bank of Michigan City, Indiana v. *Opperman*, 249 U. S. 448;
Department of Banking v. *Pink*, 317 U. S. 264.

2. Timeliness of Raising Federal Question:

Louisville & N. R. Co. v. *Hegedon*, 234 U. S. 592;
Charleston Federal Savings & Loan Ass'n v. *Alderson*, 324 U. S. 182.

3. Jurisdiction to entertain an appeal from the decision of a state court on the ground that a state statute violates the "Equal protection" and "due process of Law" clauses of the Fourteenth Amendment to the Constitution of the United States:

Lochner v. *New York*, 198 U. S. 45;
Meyer v. *State of Nebraska*, 262 U. S. 390;
Lawton v. *Steele*, 152 U. S. 133;
Mugler v. *Kansas*, 123 U. S. 623;
Hartford Steam Boiler Co. v. *Harrison*, 301 U. S. 459.

4. Jurisdiction to entertain an appeal fom the decision of a state court on the ground the state statute violates the fundamental and inherent rights of the citizens:

Citizens Savings & Loan Ass'n v. *City of Topeka*, 87 U. S. 655;
Louisville Gas & Electric Co. v. *Coleman*, 277 U. S. 32.

Therefore the appellant, John L. Mavity, respectfully submits that the Supreme Court of the United States has jurisdiction of this appeal, and that the judgment and decree of the Supreme Court of the State of Indiana be in all things reversed.

(Signed) C. James McLemore,
Attorney for Appellant.

(Signed) Earl J. Wynn,
Of Counsel.

APPENDIX "A"

No. 28287

STATE OF INDIANA, ON RELATION OF JOHN L. MAVITY, Appellant,

vs.

ROBERT H. TYNDALL, WILLIAM H. REMY, PAUL ROBERTSON, SMILEY N. CHAMBERS, CLIFFORD F. BEEKER, JESSE P. McMURTRY, Appellees

Appeal from The Marion Superior Court, Room 1. Hon. John L. Niblack, Judge

GILKISON, J.

This is a second appeal. The former, in which the lower court reversed, is reported in 224 Ind. 364, 66 N. E. (2d) 755. After the reversal plaintiff filed an amended complaint and later filed a second amended complaint. To the latter the court sustained a joint and several demurrer and the plaintiff refusing to plead over, judgment was rendered against him. The appeal is from this judgment.

The second amended complaint contains substantially the same averments as the complaint in the former appeal except in the former appeal there was an averment in the complaint that plaintiff's photograph with number across the breast thereof, his finger prints etc. were put or intended to be put in a "Rogue's Gallery" which it was averred the Indianapolis Police Department maintained. This averment is omitted from the complaint now before us. Since in the former appeal the cause was reversed solely because of the presence of this averment in the complaint, it appears that many of the questions attempted to be raised are res adjudicata, and that the one proposition upon which the reversal was based has been purposely abandoned by appellant.

The rule is quite general "that when a case has been once taken to an appellate court, and its judgment obtained on points of law involved, such judgment, however erroneous, becomes the law of the case, and can not on a second

appeal be altered or changed." *Dodge v. Gaylord et al.* (1876) 53 Ind. 365, 372, 373; *Cohoon v. Fisher* (1896) 146 Ind. 583, 585, 586, 44 N. E. 664, 45 N. E. 787; *Rooker v. Fidelity Trust Co.* (1931) 202 Ind. 641, 653, 177 N. E. 454; *Terre Haute & I. R. Co. v. Zehner* (1902) 28 Ind. App. 229, 231, 62 N. E. 508; *Mertz, Admr v. Wallace* (1929) 93 Ind. App. 289, 299, 169 N. E. 333.

The opinion in the former appeal is an exhaustive discussion of the law on the questions then before the court and we adopt it as the "law of the case" on the same matters presented by this appeal, binding alike on the parties and the court. *Cohoon v. Fisher,* supra.

In the second amended complaint there is an averment that the Acts of 1945, page 1622 et seq. § 47-846 et seq. Burns 1940 Repl. (Supp.), and particularly § 47-857 et seq. under which it is alleged defendants purport to hold plaintiff's photographs, finger prints, etc. is unconstitutional in that it is in volation of the fourteenth amendment of the Constitution of the United States and of Art. 1, §§ 1 and 21 of the Indiana Constitution. That part of the fourteenth amendment with which it is contended this statute conflicts is as follows: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Appellant has presented neither reasons or authorities indicating that the statute complained of in any way attempts to abridge the privileges or immunities of citizens and we know of none. There is nothing in this statute conflicting with "due process" or "equal protection of the laws" as provided for by the Fourteenth Amendment.

Art. 1, §1 of the Indiana Constitution contains nothing that the statute complained of could conflict with. Among other things it provides: "that all power is inherent in the People; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety and well-being * * *."

Art. 1, § 21 provides: "No man's particular service shall be demanded, without just compensation. No man's prop-

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erty shall be taken by law, without just compensation; nor, except in case of the State, without such compensation first assessed and tendered." It has been said that it is a duty of the courts to uphold the acts of the legislature if it can possibly be done, without doing violence to the constitution, and in doing so, every reasonable presumption must be indulged in favor of the legality of the act. *Morgan v. State* (1913) 179 Ind. 300, 303, 101 N. E. 6. Granting that the citizen has a property right in his finger prints, and picture and that he has a right to privacy and protection as guaranteed him by the constitutional provision quoted, these rights must be made to harmonize with the rights of the people collectively to life, liberty, safety and the pursuit of happiness likewise guaranteed by the constitution. Between these rights there is sometimes an apparent conflict. It is a duty of government in so far as possible to avoid this conflict and to provide a way of life and safety that will protect both rights. In the accomplishment of this end it is possible that each may have to yield to some extent. The general assembly has a duty to enact laws providing for the general welfare and safety of the people within the state, and such laws, if reasonable, will not be in conflict with guaranteed rights of the individual. Property or property rights may not be taken or destroyed under the guise of the police power or of a police regulation, unless the taking or destruction has a just relation to the protection of the public health, welfare, morals or safety. Unless it affirmatively appears by the act, or the history of its enactment that it has no such just relation, the police power extends even to the taking and destruction of property. It will be presumed that the act is reasonable, unless the contrary appears from facts of which the courts will take notice. *Pittsburgh etc. R. Co. v. State* (1913) 180 Ind. 245, 250, 251, 102 N. E. 25. *State v. Barrett* (1909) 172 Ind. 169, 178, 179, 180, 181, 87 N. E. 7.

The legislative power to protect the citizens in their health and safety is a very high power, but one justly exercisable and one which the legislature cannot alienate. *Cleveland, Cincinnati, Columbus and Indianapolis Ry. Co. v. Harrington* (1892) 131 Ind. 426, 436, 30 N. E. 37.

The legislature has the right to learn for itself the reasons which impel it to act. A very large measure of authority is vested in the legislature upon that subject, and unless we can say that the act is unreasonable, we are not authorized to overthrow it. *State v. Barrett* (1909), 172 Ind. 169, 179, 87 N. E. 7. *Parks v. State* (1902), 159 Ind. 211, 217 to 223, 64 N. E. 862.

The extent to which the individual right may be subordinated to the public weal cannot be fully defined. It seems to be a matter that necessarily grows as our society grows and becomes more and more complex. The matter of the legislative element of sovereignty as opposed to individual liberty, in the absence of other constitutional restrictions must be left to the gradual process of judicial inclusion and exclusion as the cases presented for decision require. *Parks v. State, supra. Davidson v. Board of Admrs. of New Orleans* (1878), 96 U. S. 90, 100, 107, 24 L. Ed. 616, 620.

"*Salus populi est suprema lex*" is an ancient legal maxim. It applies with salutary effect to the situation here presented. With full recognition of the rights of the citizen we must nevertheless hold that the safety of the people is the first law and this law must prevail even as against some of the apparent rights of privacy. See *Chicago, Etc. R. Co. v. Anderson* (1914), 182 Ind. 140, 143 105 N. E. 49, and *Hagenback, Etc. Show Co. v. Randall* (1920), 75 Ind. App. 417, 126 N. E. 501.

Under the police power possessed by every state as a sovereign, the general assembly was within its rights in enacting the several sections of the questioned statute. In so doing it exercised that full final power involved in the administration of the law as the means to the attainment of practical justice, upon which the very existence of government depends, as well as the security of the social order, the life and health of the citizen, the enjoyment of private and social life, and the beneficial use of property. 11 Am. Jur. §§ 245, 246, 247 Constitutional Law p. 966 to 974. We find nothing in the act complained of that places an unreasonable restraint upon the right of the individual as guaranteed by the Federal and State constitutions. It is, therefore, not vulnerable to this attack.

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Finding no error the judgment is affirmed.

Endorsement: No. 28287. In the Supreme Court of Indiana. State of Indiana, on Relation of John L. Mavity, Appellant, vs. Robert H. Tyndall, et al., Appellees. Appeal from the Marion Superior Court Room 1. Hon. John L. Niblack, Judge. Filed Oct. 10, 1947. Thomas C. Williams, Clerk. Judgment affirmed. Gilkison, J.

APPENDIX "B"

IN THE SUPREME COURT OF INDIANA

No. 28167

STATE EX REL. JOHN L. MAVITY, *Appellant*,

vs.

ROBERT H. TYNDALL, WILLIAM H. REMY, PAUL ROBERTSON, SMILEY N. CHAMBERS, CLIFFORD F. BEEKER, JESSE P. MCMURTRY, *Appellees*

Appeal from Marion Superior Court Room #1

RICHMAN, *J.*:

May a citizen who has been acquitted of a misdemeanor compel the surrender or destruction of his fingerprints, photographs and other identifying records made by city police officers at the time of his arrest? The trial court gave a negative answer to this interesting question by sustaining a demurrer to his complaint. Judgment for failure to plead over was followed by this appeal.

Though titled and verified as a mandamus action nevertheless the ten paragraphs of complaint may have been treated below as a suit in equity. The judgment was not against the plaintiff but against "the plaintiff, John L. Mavity". He was the real party in interest. See City of Indianapolis *v.* Central Amusement Co. (1918), 187 Ind. 387, 119 N. E 481. Appellees are named as individuals but their liability, if any, is as officials—Mayor, Board of Public Safety, and former and present Chief of Police—of the City

of Indianapolis, and as such doubtless they were intended to be charged. In this respect they have not challenged the complaint.

The essential facts averred are that Mavity, hereinafter called appellant, is 46 years old, married, employed as a locomotive engineer and fireman and has been a resident of Indianapolis for many years. Aside from a traffic violation he had never been charged with any criminal offense until January 27, 1944, when early in the afternoon while conducting himself in an orderly manner on a public street he was arrested, taken to the headquarters of the Indianapolis Police Department and "slated" on two misdemeanors, gaming and keeping a gaming device. At that time against his will his fingerprint impressions were made in triplicate. He was photographed with a card, on which there were certain numbers, placed across his chest. His signature was taken and personal description added. One set of these records was sent to the Indiana State Police, another to the Federal Bureau of Investigation at Washington, D. C., and the third retained and filed at police headquarters in Indianapolis. A few days later, after a hearing, the charges were dismissed. He then demanded the return of the data on file with the Indianapolis Police Department and that its officers obtain the return of the copies sent to the Federal Bureau of Investigation and the Indiana State Police.

(1) He avers that

> "It is the commmon practice . . . to maintain at the Indianapolis Police Department what are commonly know as 'rogue's galleries', in which are placed, for public exhibition, the photographs of persons arrested . . . being those of males and females, old, senile, middle aged, and young; the guilty and the not guilty; first offenders and hardened criminals; irresponsible citizens and transients, on the one hand, and responsible and law abiding citizens, on the other, who, through no fault of their own have fallen into the toils of the Indianapolis police department, and been found not guilty by a court of competent jurisdiction."

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It is not charged directly, but may be inferred, that his picture was put or intended to be put in such gallery. He complains that exhibition of his photographs and his fingerprint impressions as a part of the criminal records injures his reputation and causes him humiliation and mental suffering. There is an allegation charging violation of Art. 1, § 16 of the Constitution of Indiana, relating to cruel and unusual punishment, which we dismiss as inapplicable. He sets out certain rules of the Indianapolis Police Department requiring fingerprinting and photographs of persons suspected of felonies and who have criminal records, but none applying to persons arrested for misdemeanors. The relief requested includes return to him or the destruction of all the identification records above mentioned in the possession of the Indianapolis Police Department, orders against appellees to request the return of what was sent to the Indiana State Police and the Federal Bureau of Investigation, and a negative injunction against "keeping in the said police files" and against "continuing their request that the Federal Bureau of Investigation, Washington, D. C., and the Indiana State Police, Indianapolis, Indiana, keep and file" said data.

When the practices complained of were begun or by what authority, except as stated in the rules above referred to, does not appear. It may be assumed, however, that police officers making arrests in Indianapolis take such data pursuant either to direct orders of their superiors or to an established custom, since an identification department is ordinarily deemed essential to the operation of any modern metropolitan police system. It is not charged that appellant was the victim of a variation from usual procedure. In fact, the quotation from the complaint indicates that every one taken into custody by the Indianapolis police is required to submit to photographing and, we may assume, fingerprinting.

Since municipal government in Indiana is of statutory creation, it follows that operation of a city police department requires legislative authority. Undoubtedly the General Assembly might prescribe in detail means and methods for conducting the Indianapolis police department. But the legislature has not chosen to do more than authorize in

general terms the Board of Public Safety to establish, regulate and operate a police system. §§ 48-6101, 48-6102, Burns' 1933. In such operation we think it is quite clear that the Board, Chief of Police and other police officers are exercising an administrative function of the executive branch of the government, for the obligation and power to enforce the laws is executive, rather than legislative. In the absence of statutory direction or regulation the power to maintain and operate a city police system carries with it the right and duty to exercise reasonable discretion in such maintenance and operation. Courts should be cautious about interference with such an executive discretion.

The legislature undoubtedly has the power by statute to declare a public polity binding upon a city police department even though the statute does not purport to regulate city police activities. The only Indiana statutes that deal with the right to fingerprint and photograph for police purposes are found in Ch. 344 of the Acts of 1945, p. 1622, establishing the State Police Department. Under § 11 thereof and the ten following Sections a "Bureau of Criminal Identification and Investigation" is created and the powers and duties of its personnel prescribed. The members of the State Police force are required to fingerprint and photograph persons arrested for serious offenses and have the discretion to do so in arrests for misdemeanors. § 47-865 Burns' 1933 (Supp.). The Act puts no obligation upon city police departments, sheriffs and similar peace officers except to require their cooperation with the Bureau "in establishing and maintaining an efficient and coordinating system of identification." § 47-858, Burns' 1933 Supp. Without reciting in detail other provisions of the Act it is sufficient to say that the public policy manifest in its directives to members of the State Police force permits city police authorities to exercise a similar discretion in arrests for misdemeanors. There is no suggestion in the Act that identification data having once been obtained shall be surrendered or destroyed. They are to be filed as a part of the "coordinating system of identification." Filing implies retention.

As to the making of the fingerprints and photographs appellant concedes that the arresting officers were within

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their rights. This is the modern rule which the frequently cited cases of State ex rel. Bruns *v.* Calusmeier et al. (1900), 154 Ind. 599, 47 N. E. 541, helped establish. Appellant contends, however, that the language of that case excludes any right of police officials to retain the prints and pictures. In other words, he argues that they are for but two uses, the prisoner's identification and safekeeping pending trial and to aid in his recapture if he escapes and that after acquittal they are not needed by the peace officers and should either be destroyed or surrendered. He bases his claim to such relief upon his right of privacy.

The right of privacy is supported by logic and the weight of authority. The cases and most of the law magazine articles on the subject are cited and epitomized in an exhaustive and analytical note in 138 A.L.R. 22 (1942) in which the author, R. T. Keimbrought, shows the development of the doctrine from its origin (1890) in the "classic article" by Samuel D. Warren and Louis D. Brandeis entitled The Right to Privacy. 4 Harvard Law Rev. 193. Since Mr. Kimbrough's note was written a few cases have added to the literature on the subject, including *Barber v. Time, Inc.* (1942), 348 Mo. 1199, 159 S. W. (2d) 291; *Cason v. Baskin* (1944), 155 Fla. 198, 20 So. (2d) 243; and several New Jersey cases hereinafter discussed. See also *State ex rel. Reed v. Harris* (1941), 348 Mo. 426, 153 S. W. (2d) 834, decided about the time when Mr. Kimbrough's note was written.

Most of the law of privacy was developed as the result of intrusion for news or commercial purposes into the private affairs of the complainant. Comparatively few decisions involve police identification practices. The cases are collected in *McGovern v. Van Riper* (1945), 137 N. J. E. 24, 43A (2d) 514; upon which appellant strongly relies. A New Jersey statute requires, immediately upon arrest for an indictable offense, the taking of fingerprints and photographs and the forwarding of copies to the State Bureau of Identification. McGovern a sheriff, failed or refused to comply with this statute. See the companion case of *Jenkins v. McGovern* (1945), 136 N. J. E. 563, 43A. (2d) 526, reversed on appeal, 45A. (2d) 844. Indictment of McGovern followed. Before his arrest he procured a restrain-

ing order preventing the taking and forwarding of his own fingerprints and photographs. Vice Chancellor Kays after hearing modified the order to permit the taking but forbade the "dissemination" of the identification data prior to McGovern's conviction unless he "became a fugitive from justice." He unsuccessfully appealed from that part of the order permittting the taking. 45A. (2d) 843, 843. The remainder of the order was not involved in the appeal. So, as to the ruling in which we are interested, the highest court of New Jersey has not spoken since the Barletta cases referred to in Vice Chancellor Kays' opinion.

In this opinion the Vice Chancellor, aware of the fact that in New York the common law right of privacy is not recognized, nevertheless, relies on numerous New York cases to reach his conclusion. We do not regard them as applicable since in that jurisdiction legislation is the source of the right and remedy. Upon the absence of legislation is based the case of *Matter of Molineux* v. *Collins* (1904), 177 N. Y. 395, 69 N. E. 727, 65 L.R.A. 104, cited by appellees. In that case photographs and Bertillon measurements were described as public records taken pursuant to a mandatory statute and as such records not subject to surrender or destruction without a similar mandate. Where, as in the present case, fingerprints and photographs are made in the exercise of an executive discretion and not pursuant to legislative order it would seem that the authority to take would imply the authority to surrender or destroy.

(5) Turning again to the opinion of Vice Chancellor Kays it is apparent that the only way by which he could escape the legislative mandate for immediate forwarding of identification data was to declare the statute unconstitutional. To reach this conclusion he was required to put the right of privacy beyond the control of the legislature. He said (137 N. J. Eq. 24, 43 A. 2d 519):

> "It is now well settled that the right of privacy having its origin in natural law, is immutable and absolute, and transcends the power of any authority to change or abolish it."

This view is not shared by other writers on the subject and seems to us unsound. Privacy is not an absolute right,

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at least in the sense that it is always superior to the rights of the public. Mr. Kimbrough says, 138 A. L. R. 45:

> "In every case involving an assertion of a right of privacy, the court is called upon to resolve a conflict between the rights of the individual on the one hand and the interests of society on the other."

The Florida Supreme Court in *Cason* v. *Baskin, supra,* says:

> "But the right of privacy has its limitations. Society also has its rights."

In *Barber v. Time, Inc.,* supra, it is said:

> "Nevertheless, under our form of governments, citizens have duties and obligations to the community and society as well as rights. In order to preserve rights for himself one must aid in preserving them for all. This requires cooperation with others. No one is entitled to or can have complete isolation. Individual rights must be construed in the light of duties incumbent upon individuals as citizens of a free country."

And again:

> "Thus, establishing conditions of liability for invasion of the right of privacy is a matter of harmonizing individual rights with community and social interests."

In 1941 Louis Nizer in a frequently cited article entitled "The Right of Privacy, A Half Century's Developments", 39 Mich. Law Rev. 526, 529, made these statements:

> "Frequently, the public has an interest in an individual which transcends his right to be let alone. Since the whole is greater than its components parts, private rights must often yield to public interest. * * *
>
> "In any single case these two opposing forces press in upon the judge. On the one hand, he is urged to uphold the right of free speech, the right of society to know the truth, the right to make full use of the wonders of modern civilization which spread intelligence

> instantaneously to the farthest ends of the earth. On the other hand, he is urged to protect the sensibilities of the individual from the brash and vulgar attentions of the mob, to fence off a small corner of human existence against the predatory advances of selfish commercial interests. Thus, every lawsuit based upon an alleged infringement of the right of privacy poses a dilemma in which the court is called upon to find a point where the rights of the individual and the rights of society are in equilibrium; a succession of such points constitutes the line in which the privacy doctrine has progressed."

To this we add that the more complex the civilization, the more troublesome the problem of resolving such a conflict of interests and the less likely when the public safety is involved that the individual's right will be found to be dominant.

A court of equity is an appropriate forum for ascertaining this "point" of equilibrium." If such a court may balance equities between private litigants, (See McClintock on Equity, § 140) it ought to be able to balance the private and public interests and reach a conclusion on the particular facts as to the dominant right. There certainly is no such clear right in appellant or duty upon appellees as to authorize a writ of mandate. See State ex rel. Spindler v. Scheiman (1913), 179 Ind. 502, 101 N. E. 713; State ex rel. City of Hammond v. Foland (1921), 191 Ind. 342, 132 N. E. 674. The cases cited to the contrary by appellant are not in point.

The right of privacy is essentially personal though some courts have labored and found that it entails a property right. See Munden *v.* Harris (1911), 153 Mo. App. 652, 658, 134 S. W. 1076, 1078. Without quibbling over its character we hold that it is protectable in a court of equity. See cases cited in 138 A. L. R. 108. This must be true in the present controversy for there is no adequate remedy at law. The Supreme Court of Missouri has so stated in State ex rel Reed *v.* Harris, supra, wherein it denied a writ of prohibition to prevent the prosecution of a suit quite

similar to the one at bar. The court said: (348 Mo. 426, 153 S. W. 2d, 837):

> "We are satisfied that an action at law for damages would not be an adequate remedy. The damage, if any, flowing from the display of an innocent person's photograph in Rogue's galleries throughout the country, is or might be a continuing one, and not capable of any fair estimation or measurement by a money judgment. The remedy at law would be incomplete, less prompt and less efficient than resort to equitable relief, and, hence, would not constitute a bar to the latter."

An additional reason in the present case is that appellees are public officers performing a governmental function. We therefore conclude that the question posed in the first sentence of this opinion may be and is properly raised by the complaint treated as a bill in equity. So treated does it require us to resolve against appellant the conflict between his right and the public interest? If so the judgment should be affirmed.

Appellant really complains of publicity, the antithesis of privacy. What publicity has he already had? What more will be given if the identification data are retained? When he was arrested he was "slated". We assume that this included a statement on police records that he had been arrested on a certain date and charged with a certain offense. There followed entries on a court docket of the filing of an affidavit, a plea, a hearing and a judgment dismissing the charge. These records are extant. He does not ask that they be blotted or torn out of the books in which they are contained. But any one may read them for they are public records. His fingerprints, if they are to be of any value to the police, must be filed in a cabinet and indexed in such a manner that they may be found by one who is qualified to read them. So filed they tell nothing to the idle curious whose gossip might hurt his reputation. They are available and valuable only to the expert searching for criminals and concerned enough, we may assume, to inform himself as the court's disposition of appellant's

case and the final entry of acquittal. How can this harm appellant?

The actual taking of fingerprints under ordinary circumstances is not an indignity. In modern maternity hospitals babes and their mothers are fingerprinted to insure that the right baby goes home with its mother. Every person in the armed services, applicants for passports and for licenses of various kinds, employes of many large corporations, millions of persons in the United States have fingerprints in some public or private set of files. So long as they are kept there they are harmless. Accordingly, we can see no valid reason for their surrender or destruction by the police. At least none so compelling as to justify our substituting a judicial discretion for the executive discretion permitted by the absence of restrictive legislation. For this position there is support in the opinion of Vice Chancellor Bigelow in Fernicola *v.* Keenan (1944), 136 N.J.E. 9, 39A. (2d) 85. Its brevity permits quotation in full:

> "Complainant, in 1940, was arrested on a charge of assault and battery, taken to police headquarters in Newark, where he was fingerprinted, measured and photographed. The charge against him was promptly presented to the grand jury but no indictment was returned and the bill alleges that he was innocent. His identification papers remain in what is popularly known as the Rogues' Gallery and copies are on file in the offices of the prosecutor and of the sheriff of Essex County with similar records of criminals. Complainant feels that that is a great disgrace, and fears that he may thereby be prejudiced in obtaining employment and may suffer financial loss. He prays that the public officers concerned be decreed to surrender the photographs, negatives, measurements and fingerprints. The defendants move to dismiss the bill.
>
> "A statute enacted in 1930, requires law enforcement officers immediately upon the arrest of any person for an indictable offense, to take his fingerprints and to forward copies of the same, together with photographs to the State Bureau of Identification.

Even before the statute, it was lawful for the police to fingerprint, photograph and measure a person under arrest. Bartletta *v.* McFeeley, 107 N. J. Eq. 141; 109 N. J. Eq. 241. But neither the statute nor the cited decision deals with the retention of these records after the accused has been acquitted or when the lapse of time prevents prosecution.

"The taking of the fingerprints in the first place and the whole process of arrest of a possibly innocent person are a humiliation to which he must submit for the benefit of society. To the same end, the police are justified in retaining such records, in certain cases, after an acquittal or a failure of the grand jury to indict. Sometimes a grand jury dismisses a charge because it seems trivial; sometimes the trial jury must acquit a guilty person because the evidence does not establish guilt beyond a reasonable doubt. In every large community are men who have never been convicted of an indictable offense but whose associations and manner of life are such that the police feel reasonably assured that such a one, unless he turn over a new leaf, will eventually be guilty of a serious crime. If he be lawfully arrested and fingerprinted, the police are justified in keeping the prints for possible use in the future, even though no indictment is found. On the other hand, when a man of good repute has a false charge made against him and is cleared of it, it seems to me that the police should destroy his fingerprints and photograph, or remove them from the rogues gallery. But in the absence of statute, discretion in the matter belongs to the police. Since they are responsible for our safety, it is for them to decide whose identification papers will be apt to assist them in the performance of their duty. It is not for the court to make the decision. For these reasons, the bill will be dismissed. For cases from other jurisdictions, see 83 A.L.R. 129 and 138 A.L.R. 89."

It is apparent that to Vice Chancellor Bigelow the police practice most objectionable is the exhibition of an innocent man's picture in a "rogues' gallery". This appears

also in State ex rel. Reed *v.* Harris. See quotations, supra. So also in the companion cases, Schulman *v.* Whitaker (1906), 117 La. 704, 42 So. 227, 7 L.R.A. (N.S.) 274; and Itzkovitch *v.* Whitaker (1906) 117 La. 708, 42 So. 228, which were among the earliest cases giving injunctive protection of the right of privacy against police identification methods. Likewise Downs *v.* Swann (1909), 111 Md. 53, 73 A. 653, 23 L.R.A. (N.S.) 739, 134 Am. St. Rep. 586. The Louisiana cases concerned only photographs. The court would not permit them even to be taken though the two dealers in second-hand goods had frequently clashed with the police. Of Itzkovitch the court said:

> "• • • it does not appear that he has ever been convicted, and before conviction his picture should not be *posted*, (our emphasis) for then it would be a permanent proof of dishonesty."

In the Maryland case the lower court dissolved a preliminary injunction obtained by Downs against fingerprinting and photographing before trial. Denial of injunction relief was based on the fact that the complaint did "not allege the existence of a custom to put the photographs of unconvicted persons in the "rogues' gallery" or charge the defendants with a purpose to put Downs' picture there • • •." In affirming this ruling the Supreme Court concluded that taking and preserving photographs and Bertillon measurements did not violate the defendant's rights but added that:

> " • • • we must not be understood • • • to countenance the placing in the 'rogues gallery' of the photograph of any person, not a habitual criminal, who has been arrested but not convicted on a criminal charge, or the *publication* (our emphasis) under those circumstances of his Bertillon record."

In practically all the cases we find this emphasis upon "posting", "publication", "exhibition" in a public place called the "rogues' gallery". Without such a public display or manifest purpose to place an innocent complainant's photograph in juxtaposition with those of hardened criminals, we wonder if the courts would have felt justified

in interfering by injunction. The Maryland courts did not. Vice Chancellor Bigelow, though he personally would have destroyed the photographs or removed them from the "rogues' gallery", by his ruling permitted the police to exercise their discretion in the matter.

What is a "rogues' gallery"? The kind that the Louisiana court had in mind may no longer exist. At least it is not the kind that appellant has described and that is the one with which we must deal. If it actually exists its character is a matter of proof. He says (quotation supra) that it contains the pictures of every one who has "fallen into the toils of the Indianapolis police department", or, in less irritating language, who has been arrested. If this be true we would expect the pictures of the acquitted to far outnumber those of the guilty. But a visitor, brought there for the purpose of identifying some one by whom he had been molested, might conclude that all the pictures were of criminals, though one acquainted with the system would know better. Whether names, or merely numbers, appear on the photographs is not alleged. At least his bears a number. And this is not a pleasant thought for one conscious of his complete innocence of crime. Is the placing of appellant's picture in the "rogues' gallery" described in the complaint so serious a violation of appellant's right of privacy as to justify judicial protection? Most of the cases so hold and we are constrained to follow them. The allegations of the complaint present a prima facie case. Complete answer, of course, depends, upon the evidence. It follows that the demurrer was erroneously sustained.

Each of the last nine paragraphs of the complaint incorporates by reference parts of the first or some other paragraph. We have looked at the complaint as a whole and decided only one issue stated therein for the appellant. One paragraph would have presented his case. Asking too much relief does not prevent the granting of that to which he is entitled. We have eliminated the remedy of mandamus. By amending his complaint the issues for trial may and should be more simply and clearly stated.

On the facts alleged in the present complaint he is entitled (upon proof) only to an injunction against the exhibition of his photograph in the "rogues' gallery" above described.

As long as the photographs are filed away from public gaze they would seem to be in the same category as the filed fingerprints. There is no occasion for a mandatory injunction. He does not charge that the Indiana "Bureau of Criminal Identification and Investigation" maintains a "rogues' gallery". If it does it can not be restrained in this proceeding for lack of proper parties. Any relief from such exhibition by the Federal Bureau of Investigation ought first be sought by application to the Bureau. If there has been no change in the instructions of the Attorney General referred to in United States *v.* Kelly (1932), C. C. A. 2d, 55 F. (2d) 67, 83 A. L. R. 122, 127, he should have no difficulty in obtaining the copies sent to the Bureau by appellees.

We add one further word of caution. There may arise exceptional cases presenting facts that justify the surrender or destruction not only of photographs but also of fingerprints. Those cases should be decided upon their peculiar facts by a trial court, balancing the complainant's right of privacy against the public interest. We ought not make an anticipatory ruling on any hypothetical state of facts. Suffice it that the complaint before us suggests no such exceptional case.

Judgment reversed with instruction to overrule the demurrer to the complaint.

IN THE SUPREME COURT OF INDIANA

No. 28302

HENRY R. VOELKER, *Appellant*,

vs.

ROBERT H. TYNDALL, as Mayor of the City of Indianapolis, Indiana, et al., *Appellees*

Appeal From Marion Circuit Court

GILKISON, J.

Appellant filed his amended complaint for replevin in the court below, averring, among other things, that he was arrested by officers of the Indianapolis Police Department

and charged with the misdemeanor of 'Disorderly Conduct.'' That upon his arrest the policeman took his fingerprints with ink on white cards, and his signature, and placed one such card on file in the department, and sent one to the F.B.I. That upon trial of the case in a Municipal Court of Marion County he was acquitted. Thereafter he demanded such fingerprints cards and signature, which demand was refused; that he is the owner and entitled to possession of such fingerprints and name; and that the defendants claim a right to detain the same by virtue of Acts 1945, Ch. 334, p. 1622; §47-846 et seq. Burns' 1940 Repl. Supp., particularly §§ 47-857, 47-858, 47-859, 47-863, 47-865 and 47-866. That so much of this legislation as permits the appellees to retain such fingerprints and signature is unconstitutional being in violation of the Fourteenth Amendment of the Constitution of the United States, and Art 1, §§1 and 21 of the Constitution of Indiana. That the fingerprints and signatures are of the value of $10,000 and their detention is unlawful. He prays judgment for possession, and damages for their detention.

Appellees' general demurrer to the complaint was sustained. Appellant refusing to plead over, judgment was rendered against him, from which this appeal is taken.

Many of appellant's contentions have been determined by this court in the recent case of State ex rel Mavity *v.* Tyndall et al. (1946) 224 Ind. 364, 66 N. E. (2d) 755 and on second appeal (1947) — Ind. —, 74 N. E. (2d) 914.

Appellant bases his claim for possession and damages for detention upon the doctrine of the Right of Privacy. This is a well established doctrine, derived from natural law and guaranteed by both the Federal and State Constitutions. As between man and man it must be respected. Appellant has cited many authorities to that effect.

However, this right has its limitations. Society too has its rights. Under our form of government citizens have rights—which even the government may not invade and should the government trespass upon such rights the courts should grant redress. But the citizen has obligations and duties to the community, and to the government which he must keep and perform. To preserve rights for himself

he must aid in preserving them for all. There must be cooperation, and always the rights of the individual must be balanced with the duties incumbent upon him as a citizen. Barber *v.* Time Inc. (1942) 348 Mo. 1199, 159 S. W. (2d) 291. State ex rel Mavity *v.* Tyndall et al, *supra.*

Long before the enactment of the statute complained of and before the value of fingerprints as a means of identification was known, this court had held that:

> "• • • if, in the discretion of the sheriff he should deem it necessary to the safe-keeping of a prisoner, and to prevent his escape, or to enable him the more readily to retake the prisoner if he should escape, to take his photograph, and a measurement of his height, and ascertain his weight, name, residence, place of birth, occupation, color of his eyes, hair and beard, as was done in this case, he could lawfully do so. • • •"

State ex rel Bruns *v.* Clausmeier et al (1900) 154 Ind. 599, 602, 603. We have heretofore held the statute complained of to be a constitutional exercise of the police power of the state. State ex rel Mavity *v.* Tyndall et al (1947) — Ind. —, 74 N. E. (2d) 914. We adhere to that decision and adopt it as a determination of the constitutional questions presented in this case.

The pertinent question left for determination as between the appellant, an individual citizen, and the appellees, as officers of the City of Indianapolis, in their official and representative capacity, is: Who has a right to the possession of the fingerprints and signature in question?

A bureau of criminal identification and investigation is created and its duties are defined by §47-857 Burns' 1940 Repl. Supp. By §47-858 the bureau is authorized to assist chiefs of police and other peace officers in the establishment and operation of local identification systems and it makes it a duty of such chiefs of police and peace officers to cooperate with the bureau in establishing and maintaining an efficient and coordinating system of identification. The duty of chiefs of police and other local officers to make and furnish to the bureau upon request fingerprints and other

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identification data is provided for by §47-863, and §47-865 provides as follows:

> "The members of the department shall have the authority and duty to take fingerprints, and such other identification data as shall be prescribed by the superintendent of all taken into custody for offenses other than those arising solely out of violations of fish, game, conservation, traffic laws, or misdemeanors but such members of the department shall have the authority, if they deem it advisable, to take the fingerprints and such other identification data as shall be prescribed by the superintendent, of all persons taken into custody for offenses arising out of violations of fish, game, conservation, traffic laws or misdemeanors and it shall be their duty promptly to transmit and file such fingerprints and other identification data as the superintendent may prescribe."

It will be noted that the taking of fingerprints "and such other identification data as shall be prescribed by the superintendent," of all persons taken into custody for misdemeanors is authorized by this statute and it further makes it the duty of the members of the department after taking the same, "promptly to transmit and file such fingerprints and other identification data as the superintendent may prescribe." The fingerprints and signature taken by the members of the department must be filed away in the files of the bureau and transmitted agreeable with the statute to other police departments mentioned therein, for filing away.

What is the legal object of taking identification data and filing it away in the various police departments mentioned? The answer is given in § 47-866 as follows:

> "The employees of the department shall cooperate and exchange information with any other department on authority of the state or with other police forces, both within this state and outside it, and with federal police forces, toward the end of achieving greater success in preventing and detecting crimes and apprehending criminals."

The purpose is single, clear and quite salutary—to promote the public safety, by achieving greater success in preventing and detecting crimes and apprehending criminals. The accomplishment of this object has been an important duty of government in all times. Not infrequently a lack of accurate identification has been a serious handicap in clearing up a crime. It is probable that an accurate identification system, faithfully administered may be an assistance not only in finding the guilty criminal, but in clearing an innocent suspect.

Under the facts as set forth in the complaint and the law as we find it, we think the Indianapolis Police Department is lawfully in possession of the identification data described in the complaint and that it is its duty to keep it on file as the statute commands, for the purpose only as provided by the statute, and as defined by §§ 47-865 and 47-866 supra.

Finding no error, the judgment is affirmed.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 545

STATE OF INDIANA, ON RELATION OF JOHN L. MAVITY,
Appellant,

vs.

ROBERT H. TYNDALL, WILLIAM H. REMY, PAUL ROBERTSON, SMILEY N. CHAMBERS, CLIFFORD F. BEEKER, JESSE P. McMURTRY,

Appellees

STATEMENT CONCERNING PARTIES

The Appellant and appellees both stipulate that the City of Indianapolis, Marion County, State of Indiana, is a city of the first class, duly incorporated as such by the Laws of the State of Indiana, and as such, among other things has certain public officials charged with the administration, supervision, and control of the police forces and police activities of said City, to wit: a Mayor, Board of Public Safety, consisting of three commissioners, Chief of Police and Inspector of Detectives; and that furthermore the Laws of the State of Indiana, provide for and there was duly elected and installed as of January 1st, 1948, as Mayor of said City, Al. G. Feeney, who thereupon appointed the hereunder following named three commissioners of the Board of Public Safety, and thereafter there was appointed

the hereunder following named Chief of Police and Inspector of Detectives; making the following, the present particular named officials of the City of Indianapolis, Indiana, to wit:

Al. G. Feeney, Mayor,
Edward Rouls, Chief of Police,
John J. O'Neal, Inspector of Detectives,
Leroy J. Keach, Commissioner of Board of Public Safety
Albert Gisler, Commissioner of Board of Public Safety
Howard Fieber, Commissioner of Board of Public Safety

and, that Edward H. Knight, as Corporation Counsel, and Michael B. Reddington, as City Attorney, are the present attorneys for said City and said above named City officials who as such by substitution propose to and are the proper parties to continue the defense in the above entitled cause of action, without formal change in the present title of said cause, and to defend and uphold the judgment of the Supreme Court of the State of Indiana herein, now appealed from by said John L. Mavity, appellant, to the Supreme Court of the United States.

(Signed) By C. James McLemore,
Attorney for appellant,
Edward H. Knight,
Corporation Counsel for the City of Indianapolis, Indiana.
Michael B. Reddington,
City Attorney for the City of Indianapolis, Indiana.
Counsel for appellees.

Dated this 5th day of January, 1948.

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Supreme Court of the United States

OCTOBER TERM, 1947

No. 545

STATE OF INDIANA, ON RELATION OF JOHN L. MAVITY,
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ROBERT H. TYNDALL, WILLIAM H. REMY, PAUL ROBERTSON, SMILEY N. CHAMBERS, CLIFFORD F. BEEKER, JESSE P. McMURTRY,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA

PETITION FOR REHEARING OF APPEAL AND TO VACATE ORDER OF DISMISSAL.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, being entirely ignorant of and not informed of why and for what reason this Court entered its order of February 16, 1948, dismissing his appeal "for want of a *substantial* federal question" concludes that petitioner

either failed to clearly state his grounds or reasons or was too concise and too brief, or that this Court overlooked or misapprehended certain material matters and facts therein contained.

Petitioner, therefore, adopts and makes a part hereof his jurisdictional statement previously filed, and would respectfully point out the following additional grounds touching the substantiality of the question presented.

I.

THE SUPREME COURT OF THE UNITED STATES HAS NEVER DURING ITS EXISTENCE, SINCE DECEMBER 7, 1787, PASSED ON THE QUESTION OF WHETHER THE TAKING AND PERMANENT RETENTION OF FINGERPRINTS AND "ROGUES GALLERY" PICTURES OF CITIZENS, GUILTY OR INNOCENT, BY POLICE OFFICERS AT THEIR DISCRETION, VIOLATES THE RIGHTS OF PROPERTY OR PRIVACY GUARANTEED BY THE FEDERAL CONSTITUTION.

The closest approach was the dicta of a lower federal court which said that such *taking* was lawful but that they were to be *returned* to the prisoner or destroyed, upon acquittal. *United States v. Kelly* (C. C. A. 2), 55 F. (2d) 67.

This petitioner, a poor but public minded citizen, being entirely innocent, and so found by the trial court, at great expense to himself, has presented this question to this Court in utmost good faith, as a public service to his 140,000,000 fellow citizens, to have this Court define the limits of the

applicable Constitutional rights, guarantees and immunities.

Politicians and police change the rules from time to time, and each newly elected group of officials, immediately after election, impose their own brand of "constitutional tyranny". The present Indiana statutes plainly and explicitly grant the police,—yes even one single policeman,—the power to personally decide whether or not, to take criminal identification pictures and fingerprints of a citizen immediately upon arrest, irrespective of the reason or suspicion causing the arrest, and before guilt or innocence is established. This alone seems a despotic discrimination by a single policeman.

But once taken, the Indiana statutes complained of, mandatorily require said "criminal identification data" to be widely broadcast and disseminated to the public and forever prohibit their return or destruction, even upon the acquittal of an innocent person.

For example, if some drunken policeman arrested one's innocent and aged mother in the corner grocery store as an alleged shoplifter, of a loaf of bread, and decided to fingerprint and photograph her, these criminal identification data must be published and forever retained. Later proving her innocence and proving the policeman drunk, would not change the asinine results of the present Indiana law. This same mother could never afterwards, as a witness, be asked any question concerning this arrest and acquittal in any court in this land, but under the Indiana statute complained of, such criminal identification data in the hands of the authorities are subject, at their whim, to be shown to the

public forever afterwards. She remains for all time a police character.

But this same mother, accused of shoplifting a loaf of bread, upon her acquittal, would have the loaf of bread returned to her as her property.

Certainly, no present law, state or federal, requires involuntary fingerprinting of all citizens. However, the present Indiana statute permits a trumped up charge and arrest, by officials in office and power, of a political opponent or anyone else in their disfavor, simply to obtain their fingerprints and criminal photographs for the purpose of embarrasing and humiliating them, and no remedy exists under the present Indiana statute. This exact situation, in another state, has already been discussed and the court said:—

> "upon his vindication, the injury to his reputation, by circulation of such information, could not be undone." *McGovern v. Van Riper,* (1945) 137 N. J. Eq. 24, 43A (2) 514.

See also Freund: The Police Power (1904), sec. 103, p. 103; Tiedman: Persons and Property (1900), p. 157. It has been said that the taking of one's fingerprint record would ordinarily convey an imputation of crime. *People v. Hevern,* 215 N. Y. S. 412.

From what has been said, this Court must see the potential dangers in this Indiana statute, which makes this appeal embrace a substantial federal question.

II.

WHEN A STATE COURT HAS DENIED A CITIZEN HIS RIGHTS, PRIVILEGES AND IMMUNITIES, GRANTED BY AND GUARANTEED BY THE FEDERAL CONSTITUTION, IT IS THE SOLEMN DUTY OF THIS COURT TO TAKE JURISDICTION AND CORRECT THE ERROR.

Chief Justice Marshall, in a case a long time ago, said:—

> "with whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution." *Cohens v. Virginia,* 6 Wheat. (19 U. S.) 264, 5 L. Ed. 257.

The right to be heard of this single citizen is not the only point, but must be multiplied by many millions, for his rights are also the rights of all citizens. And this is not confined to the citizens of the State of Indiana, for our laws touch the lives and govern the liberties of every visitor or traveller who comes to or passes through this state.

Justice Frankfurter, only a month ago, said:—

> "This Court must give the freest possible scope to states in the choice of their methods of criminal procedure. But these procedures cannot include methods that may fairly be deemed to be in conflict with deep rooted feelings of the community." *Haley v. State of Ohio,* Case No. 51, Oct. Term 1947, decided Jan. 12, 1948.

Is it too much to suggest that innocent Indiana citizens have deep rooted feelings rebelling at being criminally photographed and fingerprinted and forever classed as criminals or potential criminals in police files all over the country?

Justice Frankfurter, further, in the same case, spoke of this violation of sentiments deeply imbedded in the feelings of our people, citing and supporting his view, the case of *McNabb v. United States,* 318 U. S. 42, a case which petitioner cited in his jurisdictional statement, and which case says:—

> "Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic."

Our Indiana Supreme Court, in its decision, held this petitioner had property rights and the Rights of Privacy in the matters concerned, but that our recent statutes set these aside. Its interpretation of our statutes and its effect and construction are binding on this Court. *Aero Mayflower, etc. v. Board of Railroad Comm., etc.* Case No. 39, October Term, 1947. Decided December 8, 1947. However, the Supreme Court of Indiana went further, and squarely held that the Federal Constitution and amendments authorized their said interpretations. This court's dismissal of this appeal in effect, would ratify this Indiana statute and thus pave the way for such legislation to be enacted in every other state in the Union, with full approval of this Court, as not being repugnant to the rights guaranteed by the Federal Constitution.

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III.

THE RIGHT UNDER POLICE POWER TO FINGERPRINT A CITIZEN AS AGAINST THE RIGHT OF PRIVACY GUARANTEED BY THE FEDERAL CONSTITUTION TO THE SAME CITIZEN HAS NEVER BEEN DECIDED BY THIS COURT AND PRESENTS A MOST SUBSTANTIAL FEDERAL QUESTION.

The science of fingerprinting to assist police in their activities had its birth about 1890 and has grown rapidly since. In 1890 Justice Louis D. Brandeis, and Samuel D. Warren gave rebirth to the Right of Privacy as guaranteed by our Constitution. 4 Harvard Law Review (1890), p. 193. The boundary line where these two conflicting rights should meet has never been defined by this Court.

Fingerprinting now involves more than 20,000,000 of our citizens. The Federal Bureau of Investigation of the United States Department of Justice protects the Rights of Privacy by maintaining a civilian file apart from the criminal file. See the book "Inside the F. B. I." by Floherty (1943), published by J. G. Lippincott, pp. 22-23. Indiana law denies the Right of Privacy of its innocent citizens by forcing their fingerprints into the only classification it provides—criminal identification files.

The situation created by the Indiana statute and petitioner's appeal therefrom, unquestionably, involves many millions of citizens, and many thousands of law enforcement officers, and the conflict between the police power, on the one hand, and the property rights and Rights of Privacy on the other hand, certainly present a most substantial

federal question which this Court, to date, has never affirmatively decided.

IV.

OUR CONSTITUTION IS PRIMARILY A MONUMENT TO GUARANTEE LIFE, LIBERTY, AND THE PURSUIT OF HAPPINESS TO INNOCENT RESPECTABLE CITIZENS, RATHER THAN A TEXTBOOK FOR POLICE SEARCHING THE MINORITY OF THE CRIMINAL ELEMENT, AND NEW UNDECIDED LIMITS OF POLICE POWER MUST PRESENT A SUBSTANTIAL FEDERAL QUESTION.

This self evident truth was again spoken of by this Court, through Justice Jackson, last month when he said:—

> "We meet in this case, as in many, the appeal to necessity. . . . But the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seem to think was a greater danger to a free people than the escape of some criminals from punishment." *U. S. v. Di Re*, Case 61, October Term, 1947, decided January 5, 1948.

Rogues gallery photographing and fingerprinting of innocent citizens offers a new and undecided question to this Court, but involves old and certain principles. Many of this Court's decisions affect only the rights of the guilty to a fair trial, before they are hung. Thank God the innocent far outnumber the guilty. The magnitude of this present case arises from the fact it involves the rights of millions of the innocent. In this case petitioner never had

any kind of a trial. He lost by demurrer. We humbly and sincerely hope this Court can resolve any doubt and hold the question substantial and note probable jurisdiction.

CONCLUSION

In conclusion, we humbly submit that this Court should vacate its order of February 16, 1948, dismissing this appeal and should note probable jurisdiction thereof, as prayed for, and hear this case on its merits, and render its decision thereon.

Respectfully submitted,

C. JAMES MCLEMORE,
Attorney for Petitioner.

EARL J. WYNN,
Of Counsel.

I Hereby Certify that the foregoing petition is presented in good faith and not for delay.

C. JAMES MCLEMORE,
EARL J. WYNN,
Attorneys for Petitioner.

FEBRUARY 16, 1948.

Per Curiam Decision.

No. 545. INDIANA EX REL. MAVITY *v.* TYNDALL ET AL. Appeal from the Supreme Court of Indiana; and

No. 557. PACIFIC EMPLOYERS INSURANCE CO. *v.* INDUSTRIAL ACCIDENT COMMISSION ET AL. Appeal from the District Court of Appeal, 1st Appellate District, of California. *Per Curiam:* The appeals are dismissed for want of a substantial federal question. *C. James McLemore* for relator in No. 545. *W. N. Mullen* for appellant in No. 557. *Donald E. Wachhorst* for Humphreys, appellee in No. 557. Reported below: No. 545, 225 Ind. 360, 74 N. E. 2d 914; No. 557, 81 Cal. App. 2d 37, 183 P. 2d 344.